91-606

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

IDA. G. DI MARTINO,

Petitioner

vs.

AMERICAN MOTORISTS INSURANCE COMPANY; AL BARKER, Individually and Doing Business as Al Barker Insurance; AL BARKER INSURANCE as Agent for American Motorists Insurance Co.; AL BARKER INSURANCE, A California Corporation; DORMAN REAL ESTATE INVESTMENT CO.; and TICOR TITLE INSURANCE COMPANY OF CALIFORNIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOR THE FOURTH DISTRICT, DIVISION TWO; AND APPENDIX

PETITION FOR A WRIT OF CERTIORARI

EDWARD Z. TABASH
Counsel of Record for Petitioner
In the United States Supreme Court, Only;
8484 Wilshire Boulevard
Suite 235
Beverly Hills, California 90211
(213) 655-7506

QUESTIONS PRESENTED

The sole question presented to the United States Supreme Court is whether it violates the Due Process Clauses of the Fifth and/or Fourteenth Amendments to the United States Constitution for a state appellate court to deny a litigant in a civil case the availability of an option that the governing state statute clearly confers on the litigant. In the instant case, California Code of Civil Procedure Section 437c, as it was written governing the period of time in which Plaintiff/Petitioner opposed a motion for summary judgment by a Defendant/Respondent, allowed the party opposing a summary judgment motion to raise evidentiary objections to the moving party's motion either in writing or orally at the hearing. Trial counsel for Plaintiff/Petitioner raised such evidentiary

objections in writing, as he was permitted to do under the governing statute. Upon appeal of the granting of summary judgment to the Defendant, the California Court of Appeal, Fourth District, Division Two, held that the evidentiary objections were waived because they were not raised orally at the hearing, even though the governing statute clearly and unequivocally permitted any party opposing a motion for summary judgment to raise such objections in writing. Plaintiff/Appellant raises the question of a fundamental deprivation of due process when a state court irrationally and capriciously denies a litigant the opportunity to proceed in a manner clearly allowed by the governing statute.

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TABLE OF CASES, STATUTES, AND TEXT BOOKS CITED

LIST OF PARTIES AND ATTORNEYS

All the parties hereto are set forth in the caption, except for the following Defendants, MONTALVO DEVELOPMENT CORPORATION; and PEDRO MONTALVO; LUPE MONTALVO. These just mentioned Defendants were named in the original pleadings in this case by trial counsel, but never served and never entered any appearance and are now effectively non-parties. Other than these three Defendants and those parties set forth in the caption, Plaintiff/Petitioner is not aware of any parent companies or non-wholly owned subsidiaries.

Defendants/Respondents AMERICAN MOTORISTS INSURANCE COMPANY, AL BARKER, Individually and Doing Business as Agent for American Motorists Insurance Co.; AL BARKER INSURANCE, A California Corporation, are represented by California attorneys, Jill M. Harris,

and Jeff Lipow, of Lipow & Harris, 2049 Century Park East, Suite 1800, Los Angeles, California 90067. Originally, they were represented by California attorneys, Ira Benjamin Katz of Weiss, Lipow & Katz, 10100 Santa Monica Boulevard, Suite 2500, Los Angeles, California 90067.

Defendant and possible Respondent, TICOR TITLE INSURANCE COMPANY OF CALIFORNIA, is represented by California attorneys, Farhad Kazemzadeh of Kazemzadeh & Jacobs, 1717 Walnut Grove Avenue, Rosemead, California 91770 and Jeffrey A. Holcomb, of Law Offices of Francis J. Cunningham III, 21800 Oxnard Street, Suite 840, Woodland Hills, California 91367.

Defendant and possible respondent, DORMAN REAL ESTATE INVESTMENT CO., is represented by California attorney, Daryl D. Hansen, 738 East Chapman

Avenue, Orange, California 92666.

Since this Petition is with respect to a summary judgment motion involving only AMERICAN MOTORISTS INSURANCE COMPANY, and AL BARKER in all the capacities set forth above and in the caption, Plaintiff/Petitioner cannot at this time assess if the other Defendants in the state court proceedings will want to participate in the proceedings before this Court. Plaintiff/Petitioner thus serves these other Defendants and possible Respondents herein and they can decide for themselves if they wish to be concerned with the content of this Petition.

REPORTS OF OPINIONS IN THIS CASE

March 20, 1991, the California Court of Appeal, Fourth District, Division Two, delivered an official but not for publication opinion in

the instant case.

The full text of the decision of the California Court of Appeal is set forth in the Appendix hereto beginning on page 77 thereof. There were three consolidated appeals in the instant case. Plaintiff/Appellant brings to the United States Supreme Court only the above stated question arising out of Appeal No. E007076 from among the consolidated appeals set forth in this Court of Appeal decision and dealing only with the grant of summary judgment to Defendant/Respondent AMERICAN MOTORISTS INSURANCE COMPANY, AL BARKER, Individually and Doing Business as Agent for American Motorists Insurance Co.; AL BARKER INSURANCE, A California Corporation; Case No. 183 971 in the Trial Court, Superior Court of the State of California for the County of Riverside.

GROUNDS UPON WHICH UNITED STATES SUPREME COURT JURISDICTION IS INVOKED.

The California Supreme Court denied discretionary review of the matter on June 19, 1991, as set forth in the Appendix hereto on page 102 thereof.

The statutory grounds for the invocation of jurisdiction of this Court is 28 U.S.C. 1257 (a), that portion thereof that allows for review by Certiorari of final judgments rendered by the highest court of a state in which a decision could be had, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution, that portion thereof that reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." .

The Fourteenth Amendment to the United States Constitution, Section 1., that portion thereof that reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." .

California Code of Civil Procedure Section 437c, governing all motions for summary judgment in California, which until revised effective date January 1, 1991, read in relevant part: "Evidentiary objections not made either in writing or

orally at the hearing shall be deemed waived." The complete text of this statute as it appeared on May 26, 1989, the date of the hearing on the motion for summary judgment which Plaintiff/ Appellant opposed, is set forth in the Appendix and the immediately above quoted language appears on page106-7 thereon.

STATEMENT OF THE CASE

Plaintiff/Petitioner held a third trust deed on a home in Riverside, California. Defendants/Respondents, AMERICAN MOTORISTS INSURANCE COMPANY, and AL BARKER, in all their capacities as appears in the caption, hereinafter referred to collectively as "Defendants/ Respondents", held a second trust deed on the property in question. California Federal Bank held a first trust deed.

Plaintiff/Petitioner and California Federal Bank foreclosed on their trust deeds. The first trust deed was reinstated and paid off. Plaintiff/ Petitioner purchased the property in question at the trustee's sale, and took title subject to the prior trust deeds of record, at no time did she ever assume the second trust deed. Plaintiff/ Petitioner filed the instant case in the trial court in order to enjoin the

foreclosing of the second trust deed held by Defendants/Respondents, contending that this trust deed is unenforceable. She lost the case on summary judgment and also lost the property in question. A more complete exposition of the facts of this case are set forth in the Appendix hereto, on pages 14 - 21, thereof, contained in the body of the Petition for Review to the California Supreme Court.

On May 26, 1989, a hearing took place on the motion for summary judgment of Defendants/Respondents. A motion for reconsideration was denied. Plaintiff/Petitioner requested the trial court to prepare and file a memorandum opinion setting forth the basis of its order granting summary judgment. The trial court never responded to this request.

As set forth above, and as shown in the opinion of the Court of Appeal, as set forth in the Appendix hereto on pages 96, 97 thereof, the summary judgment in favor of Defendant/Respondents was affirmed on March 20, 1991.

On April 4, 1991, Plaintiff/Petitioner filed her petition for rehearing with the Court of Appeal, which was denied without comment on April 16, 1991, and was mailed to Plaintiff/Petitioner on April 23, 1991, and received on April 24, 1991. On April 26, 1991, a timely Petition for Review in the California Supreme Court was filed by Plaintiff/Petitioner, as set forth in the Appendix hereto, beginning at page 1 thereof. The California Supreme Court denied the petition for discretionary hearing on June 19, 1991, as set forth on page 102 of the Appendix hereto.

The Petition for Review in the California Supreme Court was timely filed according to California Rules of Court 28 (b), which says in relevant part, "A party seeking review must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final as to that court . . ." . California Rules of Court 24 (a), says in relevant part, "A decision of a Court of Appeal becomes final as to that court 30 days after filing . . ." . As set forth on page 77 of the Appendix hereto, the decision of the Court of Appeal was filed on March 20, 1991, and became final therefor on April 19, 1991. As set forth on page 1 of the Appendix hereto, the Petition for discretionary review to the California Supreme Court was filed on April 26, 1991, within ten days after the decision

of the Court of Appeal became final.

As set forth above, and as set forth in full text on pages 106, 107 of the Appendix hereto, the relevant language of California Code of Civil Procedure Section 437c, permits a party opposing motion for summary judgment to raise evidentiary objections to the moving party's papers either in writing or orally at the hearing. As also set forth in the Appendix hereto, at pages 114,115,118 thereof, the deletion of that portion of the California summary judgment statute that permits evidentiary objections to be raised either in writing or orally at the hearing on the motion, replacing it with a requirement that such evidentiary objections must be raised at the hearing and no longer giving the opposing party the option of raising such objections in writing in order to avoid a waiver of those objections, did not occur until the

legislative session of 1990, becoming effective January 1, 1991.

Thus, at the time the herein relevant motion for summary judgment was heard and opposed, in May and June of 1989, the governing statute allowed for the opposing party to raise evidentiary objections in writing instead of orally at the hearing in order to avoid a waiver of the objections. The relevant language says "or." An opposing party has a choice between orally raising the objections at the hearing on the motion or in writing.

In fact, as set forth in the 1990 Legislative Counsel's Digest that accompanied the 1990 revisions of Section 437c, the California Legislature considered it a change in existing law to create the requirement that in order to avoid a waiver, the only option an opposing party has is to raise evidentiary objections at the hearing.

Indeed, for purposes herein, the relevant changes in 1990 deleted the option of preserving one's evidentiary objections if raised in writing and allowed only the raising of same at the hearing, if a party did not want to suffer a waiver of these objections, as shown on page114, 115, 118 of the Appendix hereto. Moreover, as also set forth in the Appendix hereto, on page 118 thereof, the 1990 legislation altered Section 437c by adding the sentence "Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived."

Thus, in May and June of 1989, the months of consideration of the herein relevant motion for summary judgment, the statutory scheme, as it had since 1980, and as perpetuated in the 1986 revisions thereof, as set forth in the Appendix hereto, on pages106,107 thereof, explicitly permitted a party opposing a

motion for summary judgment to avoid a waiver of evidentiary objections by either raising those objections in writing or orally at the hearing on the motion.

CURRENT STATUS IN THE STATE COURTS OF CALIFORNIA

Pursuant to the granting of various motions for summary judgment, including the one from which the granting of summary judgment was appealed by Plaintiff/Petitioner, and upheld adverse to Plaintiff/Petitioner by the California Court of Appeal, as set forth above and herein throughout, all proceedings, as of now, stand terminated adverse to Plaintiff/Petitioner in the California state courts. As set forth above, the California Court of Appeal denied a rehearing and the California Supreme Court denied discretionary review.

In this Petition, Plaintiff/Petitioner asks the United States

Supreme Court to order the California Court of Appeal, Fourth District, Division Two, to reconsider its decision in light of now having to deem the evidentiary objections raised in writing by Plaintiff/Petitioner not waived by virtue of having so set them forth in writing as permitted by the governing statute at the time.

FIRST INSTANCE OF STATE COURT DUE PROCESS VIOLATION

It was not until the California Court of Appeal issued its opinion on March 20, 1991, that Plaintiff/Petitioner became aware that she had been denied fundamental due process. In that opinion by the Court of Appeal, the justices thereof raised for the first time the notion that Plaintiff/Petitioner waived her evidentiary objections because they were not raised orally at the hearing, even though they

were set forth in writing as permitted by the governing statute, California Code of Civil Procedure Section 437c, as set forth on pages 106, 107 of the Appendix hereto. Up to this point, such an irrational and capricious ignoring of the clear language of the governing statute had never occured in this case. Thus, the first time Plaintiff/Petitioner raised the issue was in the Petition for Review to the California Supreme Court, as set forth in the Appendix hereto, on pages 27, 28, 38 thereof, which Petition was timely filed on April 26, 1991, and which Petition was rejected for discretionary review by the California Supreme Court on June 19, 1991, as set forth on page 102 of the Appendix hereto. In this Petition to the California Supreme Court, Plaintiff/Petitioner complained of the Court of Appeal's "fabricated waiver" as set forth on pages 25, 38-47, of the Appendix hereto.

ARGUMENT

As set forth above, it is a fundamental violation of due process for a state appellate court to deny a litigant an option clearly available under the governing statute. As set forth above, the governing California statute at the time of the consideration of the summary judgment motion herein relevant, permitted the party opposing summary judgment to either set forth evidentiary objections in writing or orally at the hearing on the motion. Not until more than a year after the consideration of the summary judgment motion herein relevant did the California Legislature alter the statute to provide that the only way to avoid a waiver of a party's evidentiary objections is to raise those objections at the hearing. As set forth on pages 114,115 of the Appendix hereto, the 1990 changes

made to the governing statute by the California Legislature admitted that up until those changes, evidentiary objections could be made in writing. The exact wording of the Legislative Counsel's Digest is: "Existing law among other things, provides evidentiary objections not made either in writing or orally at the hearing shall be deemed waived." The Legislative Counsel's Digest goes on to say: "This bill (meaning the 1990 revisions) would revise existing law and provide all of the following: (1) evidentiary objections to a motion for summary judgment not made at the hearing shall be deemed waived . . . (3) any objections based on the failure to comply with provisions governing supporting and opposing affidavits or declarations shall be made at the hearing or shall be deemed waived." Thus, the Legislature, itself, has declared that up until the 1990

changes in the statute, signed by the Governor of California on September 30, 1990, and effective January 1, 1991, evidentiary objections for all purposes could be made in writing or orally at the hearing. Thus, in May and June of 1989, when the summary judgment motion at issue herein was argued and decided, California law clearly permitted the opposing party to raise objections in writing, as well as orally at the hearing on the motion, without their being any difference in the legal consequence for the choice of one or the other approach.

For the California Court of Appeal to ignore the clear import of the controlling statute and to arbitrarily read out of the statute an indisputably permissible option, violates fundamental due process.

> "In all instances, the state must adhere to previously declared rules for adjudicating the claim or at

least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken."

Treatise on Constitutional Law, Substance and Procedure, Rotunda, Nowak & Young, West Publishing Co., Volume 2, Section 17.1, page 201. Due process has no meaning if not a reasonably predictable and non arbitrary mode of proceeding in the way courts handle and decide cases. For an appellate court, as was the case with the California Court of Appeal, herein, to capriciously and literally without warning, fabricate in its opinion a doctrine of a waiver of a right for noncompliance when the controlling statute explicitly deems the conduct in question to constitute compliance, and thus a preservation of the right, strikes at the very heart of due process. As set forth on pages85-88,86,of the Appendix hereto,

the California Court of Appeal analogizes waiving evidentiary objections at a hearing on the motion for summary judgment, totally ignoring the fact that with respect to summary judgment motions, there was a governing statute which clearly conferred upon the opposing party the option of raising such objections either in writing or orally at the hearing. The California Court of Appeal by concocting this unanticipated view in its opinion deprived Plaintiff/Petitioner of her reasonable expectation that she could rely on the clear language of the statute.

THERE IS NO COUNTERVAILING BURDEN THAT STATE GOVERNMENT WOULD SUFFER, BY CORRECTING THE VIOLATION OF DUE PROCESS HEREIN COMPLAINED OF, THAT WOULD MILITATE AGAINST GRANTING THE RELIEF PRAYED FOR.

One of the factors that this Court

has looked to in permitting a remedy for violations of due process is the interests of the government body, in this case, the state court system of California, and specifically the fiscal and administrative purposes to be borne by such government body as a result of this Court's rectifying the deprivation of due process in question, Mathews v. Eldridge, 434 U.S. 319, 335 (1976). In the instant case, the burden on the California court system would be negligible if this Court ordered the California Court of Appeal to reconsider the appeal of Plaintiff/ Petitioner in light of her clear entitlement not to have the evidentiary objections, properly raised in writing in the trial court, be treated as waived.

THE INTEREST OF PLAINTIFF/ PETITIONER IN THE REAL PROPERTY AT ISSUE IN THE INSTANT CASE IS A PROPERTY INTEREST CLEARLY WITHIN THE PROTECTION OF CONSTITUTIONAL DUE PROCESS.

The interest in real property of Plaintiff/Petitioner at issue in this case is clearly within the scope of Due Process protection, Board of Regents v. Roth, 408 U.S. 564, 571-572 (1972). "It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Board of Regents v. Roth, 408 U.S., at page 577. The opinion of the California Court of Appeal in inventing, out of nowhere, a waiver against Plaintiff/ Petitioner when the statute governing summary judgment motions, at the time, clearly permitted her to proceed as she

did without suffering any waiver, was the type of arbitrary and capricious action that deprived Plaintiff/Petitioner of her property interest in a manner that had no justification and that violated the predictability and reasonably relied upon expectation of a litigant that the clear import of the governing statute would protect her upon her compliance therewith.

In Arnett v. Kennedy, 416 U.S, 134, 153-154 (1974), this Court held that a legislature, in that case, Congress, could grant a substantive right and limit the procedures to be employed in preserving the right in question. In the instant case, Plaintiff/Petitioner is not challenging the controlling statute, but a state appellate court's inexplicable disregard of Plaintiff/Petitioner's clear compliance with a procedural requirement explicitly set forth in the very statute, itself.

THE HARM SUFFERED BY PLAINTIFF/ PETITIONER AS A RESULT OF THE CAPRICIOUS AND UNJUSTIFIED RULING OF THE STATE APPELLATE COURT COMES WITHIN THE PURVIEW OF THE BROAD AND FLEXIBLE CONCERNS FOR DUE PROCESS THAT HAS ALWAYS GUIDED THIS COURT.

"Due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). ". . . due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). Surely, due process is expansive enough to embrace the protection of a litigant from a totally arbitrary decision of a state appellate court which clearly violates all reasonable

expectation under the governing statute. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property, or as plaintiffs attempting to redress their grievances." Logan v. Zimmerman Brush Company, 455 U.S. 422, 429 (1982).

THE VIOLATION OF THE DUE PROCESS RIGHTS OF PLAINTIFF/PETITIONER IN THE INSTANT CASE BY THE CALIFORNIA COURT OF APPEAL IS SO EGREGIOUS AS TO JUSTIFY INVOKING THE FEDERAL CONSTITUTION TO RECTIFY THE STATE'S ACTIONS.

This Court cannot and should not peer into every single act of every single state court and second guess state courts on minor matters. However, when a state court has seriously violated a litigant's due

process rights, it is fitting and proper for this Court to intervene under authority of the national Constitution. "Each of our due process cases has recognized, either explicitly or implicitly, that because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Logan v. Zimmerman Brush Company, 455 U.S., at page 432.

For the California Court of Appeal to deny Plaintiff/Petitioner the very approach to preserving her evidentiary objections that the governing statute explicitly granted her is to violate "fundamental fairness." Walters v. National Association of Radiation Survivors, 473 U.S. 305,

320 (1985).

THE DECISION OF THE CALIFORNIA COURT OF APPEAL BY SUDDENLY, AND WITHOUT WARNING, AND WITHOUT THE PARTIES HAVING AN OPPORTUNITY TO EVEN BRIEF THE QUESTION, FABRICATING A WAIVER OF EVIDENTIARY OBJECTIONS, CONTRARY TO THE EXPLICIT WORDING OF THE CONTROLLING STATUTE, VIOLATED THE DUE PROCESS RIGHTS OF PLAINTIFF/PETITIONER, GENERALLY, AND SPECIFICALLY VIOLATED HER RIGHT TO NOTICE.

As set forth in the Appendix hereto, on pages 85-88, thereof, the California Court of Appeal decided that even though Plaintiff/Petitioner complied with the governing statute in raising her evidentiary objections that she still must suffer a waiver thereof because she did not also raise them orally at the hearing on the summary judgment

motion. The Court of Appeal cited a 1921 case, at page 87 of the Appendix hereto, that preceded by fifty nine years the 1980 revisions of California Code of Civil Procedure Section 437c, which were governing at the time of the herein relevant summary judgment motion.

The 1921 case cited by the Court of Appeal dealt with trial objections and totally ignored the fact that summary judgment motions in California are governed by a specific statute and that the statute in question, at the time of the summary judgment motion in question, explicitly allowed a party to raise evidentiary objections in writing, as an alternative to raising them orally at the hearing on the motion.

For the California Court of Appeal to so unexpectedly create such a waiver, out of nowhere, without the parties

having a chance to even brief the issue or to address it, violated the fundamental right of notice that is an integral part of due process, Arnett v. Kennedy, 416 U.S., at page 164.

CONCLUSION

Based on the foregoing, it is argued that the fundamental due process rights of Plaintiff/Petitioner were violated when the California Court of Appeal totally and without any justification ignored the governing statute at the time, which permitted opposing parties to raise evidentiary objections either in writing or orally at the hearing, and fabricated a waiver that it imposed upon Plaintiff/Petitioner, resulting in a finding that she had waived her evidentiary objections, even though she raised those objections in one of the two alternative ways explicitly permitted by the controlling statute.

Indeed, over and above any and all authority that can be cited to bolster the position of Plaintiff/Petitioner, the violation of her fundamental right of due process guaranteed by the United States Constitution, resulting from the arbitrary and unexpected decision of the California Court of Appeal to deny her rights clearly provided by the governing statute, should be self evident.

PRAYER FOR RELIEF

Plaintiff/Petitioner hereby prays that this honorable United States Supreme Court issue a Writ of Certiorari to the California Court of Appeal, Fourth District, Division Two. The ultimate relief prayed for, after appropriate briefing and argument, is that this Court direct said California Court of Appeal to reconsider the ruling now herein challenged and decide the matter in the context of not deeming the evidentiary objections of Plaintiff/Petitioner, raised in writing in the trial court, to be waived.

EDWARD TABASH, ESQ.
Counsel of Record
for Plaintiff/Petitioner
In All Proceedings
Before The United States
Supreme Court, Only;
8484 Wilshire Boulevard
Suite 235
Beverly Hills, California
90211

(213) 655-7506

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

IDA. G. DI MARTINO,

Petitioner

vs.

AMERICAN MOTORISTS INSURANCE COMPANY; AL BARKER, Individually and Doing Business as Al Barker Insurance; AL BARKER INSURANCE as Agent for American Motorists Insurance Co.; AL BARKER INSURANCE, A California Corporation; DORMAN REAL ESTATE INVESTMENT CO.; and TICOR TITLE INSURANCE COMPANY OF CALIFORNIA,

Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOR THE FOURTH DISTRICT, DIVISION TWO;

EDWARD Z. TABASH
Counsel of Record for Petitioner
In the United States Supreme Court, Only;
8484 Wilshire Boulevard
Suite 235
Beverly Hills, California 90211
(213) 655-7506

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OF CERTIORARI

4th Civil No. E 007076

4th Civil Appeal - Consolidated
Nos. E 006384
E 007076
E 007190

SUPREME COURT OF THE STATE OF CALIFORNIA

IDA G. DI MARTINO,

Plaintiff,
Appellant,
Petitioner,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, et al,

Respondents,
Defendants.

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SUPREME COURT
LOS ANGELES

PETITION
FOR REVIEW

IDA G. DI MARTINO,

Plaintiff,
Respondent,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, et al,

Defendants,
Appellants.

SUPERIOR COURT OF
RIVERSIDE COUNTY
HON. GORDON R. BURKHART
HON. RONALD T. DEISSLER

NICOLAS FERRARA, ESQ., Attorney at Law
8484 Wilshire Boulevard, Suite 200
Beverly Hills, CA 90211; (213)655-5294
Attorney for Plaintiff, Appellant,
Petitioner

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NICOLAS FERRARA
Attorney at Law
8484 Wilshire Boulevard
Suite 200
Beverly Hills, California 90211
Telephone: (213) 655-5294

Attorney for Plaintiff/Appellant/
Respondent

SUPREME COURT OF THE STATE OF CALIFORNIA

IDA G. DI MARTINO, Plaintiff, Appellant, Petitioner, vs. AMERICAN MOTORISTS INSURANCE COMPANY, et al, Respondents, Defendants.	4th Civil No. E 007076 Consolidated No. E 007190 Consolidated No. E 006384 Superior Court No. 183971 Riverside County
IDA G. DI MARTINO, Plaintiff, Respondent vs. AMERICAN MOTORISTS INSURANCE COMPANY, et al, Defendants, Appellants.	PETITION FOR REVIEW 4th Civil No. E 007190 Consolidated No. E 007076 Consolidated No. E 006384 PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Ida G. Di Martino is the plaintiff in the trial court and the appellant in the Court of Appeal, 4th District, Division Two, in 4th Civil No. E 007076.

Petitioner Ida G. Di Martino is the plaintiff in the trial court and the respondent in the Court of Appeal, 4th District, Division Two in 4th Civil No. E 007190.

Petitioner is seeking a review of the 4th Civil No. E 007190 because the Court of Appeal reversed the trial court's order taxing (denying) attorney's fees sought as costs.

4th Civil No. E 006384 arises out of the same trial court Case No. 183971 in which Ticor was a defendant. Ticor was the Trustee of the same deed of trust

involved in 4th Civil Nos. E 007076 and E 007190. Ticor moved for summary judgment which was granted from which Di Martino appealed.

The liability of Ticor and its co-defendants arises substantially out of the same facts, and is the reason for the consolidation.

Petitioner respectfully petitions this Court for an order granting a review of these three cases after the decision of the Court of Appeal affirming the summary judgments of the trial court in 4th Civil Nos. E 007076 and E 006384, and reversing the trial court's Order denying attorney's fees in No. E 007190.

GROUNDS FOR HEARING

It is necessary for the Supreme Court to grant a review. The decision of the Court of Appeal is totally contrary to well settled and established law and decisions of this State, as set

forth herein and in the petitioner's briefs on appeal filed in the Court of Appeal. The Court of Appeal disregarded precedent and went on a fishing expedition to find a basis for its decisions. The basis itself is contrary to precedent.

From the foregoing, which appears undisputed in this case, it becomes apparent that this petition should be granted to secure uniformity of decisions and the settlement of important questions of law. Whenever a decision of the Court of Appeal departs from well settled and established law laid down by the Supreme Court there is an absence of uniformity of decision, plain error and injustice which this Court should correct.

DECISION OF COURT OF APPEAL

On March 20, 1991, the Court of Appeal rendered its erroneous decision. A copy of the Opinion is in the Appendix hereto. All of the facts have been

summarized in petitioner's briefs. The facts found by the Court of Appeal are in dispute. The Court of Appeal disregarded precedent and misapplied the law.

STATEMENT OF THE CASE

Di Martino is the plaintiff and appellant in Case Nos. E 007076 and E 006384; and the respondent in Case No. 007190; all three cases were consolidated on appeal.

Montalvo owned Montalvo Development Corporation (MDC), a subdivision developer in the City of Banning. He and his wife owned their home in Riverside against which Di Martino held a third trust deed; defendants Al Barker Insurance and American Motorists held a second trust deed;and Cal-Fed held a first trust deed.

Di Martino and Cal-Fed foreclosed; the first trust deed was reinstated and

paid off, but not by Montalvo; Di Martino purchased at the trustee sale, and took title subject to the prior trust deeds of record, at no time assuming the second trust deed.

Di Martino filed her complaint to enjoin Ticor (Trustee), Al Barker Insurance and American Motorists (herein "American Motorists"), from foreclosing the second trust deed on the grounds the second trust deed was unenforceable, and filed and recorded her "lis pendens"; injunctive relief was denied on grounds relief at law was adequate.

Di Martino filed, with leave of court, her First Amended and Supplemental Complaint joining Dorman, the purchaser at Ticor's Trustee sale, and alleged in substance and effect the above and the following. (Clk. Tr. p. 215).

The foregoing facts are undisputed at least by Di Martino.

The ultimate issue raised by Di Martino in her pleading is that the second trust deed and the promissory note it secured are unenforceable. The following allegations are sub-issues which if proven proves the ultimate issue. (Clk. Tr. pp. 215, et seq.).

1. Di Martino alleged that the Montalvo note and trust deed, dated and recorded on or about November 2, 1978, for $50,000.00 was obtained from the individual Montalvo as collateral to secure four subdivision bonds American Motorists issued to MDC (Montalvo Development Corporation) as principal and to City of Banning (City) as obligee. In addition, American Motorists obtained from the individual Montalvo in 1978 and 1979 a "General Agreement of Indemnity", an "Agreement for Lent Collateral", and a "Collateral Receipt 1838", to further secure the four subdivision bonds.

2. The Final Tract Map and the City's terms and conditions which City imposed did not provide for installation of sidewalks in the subdivision. There was no other contract with City.

3. Prior to March 5, 1981 (on December 5, 1980) City had approved and accepted all of the work of improvements MDC had performed under the Final Tract Map and City's terms and conditions, and City authorized the release of the four subdivision bonds. (Clk. Tr. p.225, par. 22; p. 619). At that time there was no debt owed (1) on the Montalvo note and second trust deed; and (2) no debt owed to City on the four bonds.

4. On September 27, 1985, Montalvo filed their petition in bankruptcy (Chapter 7); Al Barker Insurance (American Motorists) and the Montalvo note and second trust deed were scheduled for discharge. On April 2, 1986, Montalvo

Montalvo received their final discharge. At that time no debt was owed on said note and second trust deed. (Clk. Tr. p. 222, par. 13).

5. At no time did Al Barker Insurance (American Motorists) petition the Bankruptcy Court for an order to terminate the automatic stay as required by the Bankruptcy Code. (Clk. Tr. p. 223, lines 1-2).

6. The "Collateral", "Surety" and Guaranty Agreements identified in paragraph 1. above were personal proveable claims in Montalvo's bankruptcy and they were discharged.

7. City's release of the four bonds (par. 3 above) released the note and second deed, and the "General Agreement of Indemnity", and the "Agreement for Lent Collateral" and the "Collateral Receipt 1838" identified in paragraph 1. above.

8. If any obligation was owed Al Barker Insurance, American Motorists, and

City by MDC and/or by Montalvo, such obligations were personal proveable claims and were discharged in Montalvo's bankruptcy. (Clk. Tr. p. 225, par. 25).

9. About June 1981, almost six months after City had approved and accepted Montalvo's improvements and authorized the release of the four bonds, City for the first time decided it wanted sidewalks installed in the subdivision, and demanded that Montalvo post sidewalk bonds before City would release the four bonds. MDC posted the sidewalk bonds under protest that MDC was not obligated to install sidewalks in the subdivision. City and Montalvo/MDC did not execute any contract obligating Montalvo/MDC to install sidewalks. The sidewalk bonds (Clk. Tr. pp. 237-239) provide that the bonds are conditioned on the existence of a contract entered into by the City and Principal to do and perform the

installation of sidewalks. No such contract was ever made or entered into and none exists (Clk. Tr. pp. 220-221; 229, 230); and Al Barker Insurance and American Motorists were never obligated or liable to City on said bonds.

10. There was no consideration given for the sidewalk bonds; for the note and second trust deed; for the "General Agreement of Indemnity", for the "Agreement for Lent Collateral", for the "Collateral Receipt" AFTER City had authorized the release of the four bonds. (Clk. Tr. pp. 223, 224, 226, 229; paragraphs 1 and 3 above).

11. The City's claims for payment of the sidewalk bonds were barred by the Statute of Limitations, C.C.P., §§343, 337, 359.5, a four years statute of limitations, and by laches; City did not assert its claim for payment of the sidewalk bonds until on or after July 8,

1986. (Clk. Tr. p. 226, 230).

12. When American Motorists (Al Barker) paid City $32, 162.34 plus $584.73 on the sidewalk bonds, said payment was "voluntary". (Clk. Tr. p. 230).

ANSWER OF AL BARKER INSURANCE AND AMERICAN MOTORISTS

(Clk. Tr. pp. 305-312)

By their answer, Al Barker Insurance and American Motorists denied under oath all of the material allegations of facts alleged by Di Martino which are set forth above.

Hereinafter, defendants Al Barker Insurance and American Motorists will be collectively called American Motorists.

THE SUMMARY JUDGMENT MOTION

American Motorists moved the trial court for summary judgment, contending no triable issues of facts exist. To support the motion and contention,

American Motorists filed the declarations of Attorney Harris and Al Barker. Attorney Harris is one of the attorneys of record for American Motorists, Al Barker and Al Barker Insurance. No other declarations were filed. (Clk. Tr. pp. 360, 373).

DI MARTINO'S RESPONSE

Di Martino responded to said motion by filing her "Evidentiary Objections" and her opposition to said motion (Clk. Tr. pp. 429-434; Clk. Tr. pp. 421, 439, 448, 698, 415) which included authenticated and certified true copies of the Final Tract Map, the City of Banning's terms and conditions to said Tract Map, and a number of records from the City of Banning to support the allegations of her First Amended and Supplemental Complaint which are located in the Clerk's Transcript at pages 612-666. Apparently the Court of Appeal either was not aware of them, or chose

to disregard them, since said Court did not address them in its Opinion. Instead, the Court of Appeal erroneously referred to said documents and records as not being certified or authenticated. (Opinion p.7 at lines 9-13, 2d par.).

THE SUMMARY JUDGMENT

American Motorists' motion was granted and summary judgment was entered on June 9, 1989, in favor of American Motorists and against Di Martino.

MOTION FOR RECONSIDERATION

NEW TRIAL

On June 9, 1989, Di Martino moved the trial court for reconsideration, for a new trial (Clk. Tr. p. 710), on the grounds, among several others, that the declarations of Attorney Harris and Al Barker were insufficient to sustain the judgment, and that the declaration of Al Barker was false in all material

respects. (Clk. Tr. pp. 714-717; deposition of Al Barker).

Di Martino requested the trial court to prepare and file its memorandum opinion setting forth the basis of its order granting summary judgment (Clk. Tr. p.705); there was no response or comment. (Open. Brief p. 44).

APPEAL - OPINION OF COURT OF APPEAL

SUMMARY JUDGMENT AFFIRMED

On March 20, 1991, the Court of Appeal 4th District, Division Two, affirmed summary judgment. A copy of the Opinion of said Court is attached hereto in the Appendix hereof and made a part hereof.

OPINION NOT FOR PUBLICATION

PRECEDENT NOT FOLLOWED

NEW RULE OF EVIDENCE

The Court of Appeal cited their Opinion as one not for publication.

Because the Opinion is not for

publication and does not become precedent for others to follow or rely on does not license the Court of Appeal to treat the appeal as though it followed a trial on the merits; to give full credibility to incompetent, hearsay and irrelevant matters loosely called evidence, and ignore the best evidence rule.

That this Court of Appeal has done this is not open for controversy. Under the theory of a fabricated waiver this Court of Appeal has given birth to a new rule which defies precedent laid down by the Supreme Court and published opinions of Courts of Appeal.

It is just as important for the Supreme Court to grant review of an unpublished opinion, to correct unjust results and to protect litigants from unauthorized acts of inferior courts.

The Court of Appeal's fabricated theory of waiver enabled the Court of Appeal to

allow American Motorists to retain its summary judgment on wholly incompetent evidence. To justify this action the Court of Appeal stated that American Motorists had waived its objections to Attorney Ferrara's declaration, the waiver cuts against both parties. Apparently the Court of Appeal did not realize its obvious error in that Attorney Ferrara's declaration referred to exhibits which were all authenticated and certified as true copies (Clk. Tr. pp. 612-666) which replaced the exhibits attached to his declaration pursuant to leave of court. (Rptr. Tr. May 26, 1989, pp. 1-4).

Moreover, American Motorists cannot cure its evidentiary deficiency by waiving its objections to Di Martino's evidence. And, moreover, American Motorists evidence must stand alone to support the judgment.

COURT OF APPEAL'S RELIANCE ON SOMMER v. MARTIN MISPLACED

The Court of Appeal relied on the case of Sommer v. Martin (1921) 55 Cal. App.603, which predated the summary judgment law by 12 years. Sommer was not and could not be a case in point mainly because it is a case on appeal after a trial on the merits.

PETITION FOR REHEARING

On April 4, 1991, Di Martino filed her Petition for Rehearing, which said Court denied without comment on April 16, 1991, which was mailed to Di Martino on April 23, 1991, and received on April 24, 1991. A copy thereof is made a part of the Appendix.

The Petition for Rehearing focused mainly on the obvious material errors, namely:

1. The Court of Appeal erred in determining for the first time on appeal

and without permitting any briefing that Di Martino had waived her evidentiary objections to the competency of moving parties' declarations and exhibits. This would be a triable issue of a material fact.

2. Rehearing should be granted, because the Court of Appeal had erred in concluding that Di Martino had waived her objections to the incompetence of the evidence presented in support of the summary judgment motion. This would be a triable issue of a material fact.

3. Regardless of whether there can be a waiver of competence of evidence, there was no waiver here, because Di Martino had repeatedly requested evidentiary rulings from the trial court.

4. The Court of Appeal erred in determining that the validity and enforcement of the surety bonds did not depend upon the validity and enforcement

of the underlying agreement, if, in fact, there was an agreement. This would be a triable issue of a material fact.

5. The Court of Appeal erred in concluding that a controversy existed as to whether Montalvo was obligated to install sidewalks in the subdivision. Without an enforceable contract, no such obligation exists and therefore there is no controversy. This would be a triable issue of a material fact.

6. The Court of Appeal erred in not addressing the triable issue of the material fact that the City's release of the four surety bonds released the surety and the security.

7. The Court of Appeal erred in not addressing the triable issue of the material fact that there was no contract between Montalvo/MDC and City and that there was no consideration given for Montalvo/MDC to install sidewalks or for the sidewalk bonds. Instead, the Court

of Appeal argued that the payment of the bond premium was consideration for the bond which missed the point. Since American Motorists had no liability to pay the bonds, the consideration paid for the bonds failed and thus no consideration.

8. The Court of Appeal erred in not addressing the triable issue of material fact that the sidewalk bonds were not consideration for the release of the four bonds. The release of the four bonds was City's existing obligation, which City was already legally bound to release. There is no consideration for such a release.

9. As to when the statue of limitations commenced to run, and when issue is joined on such plea, the evidence being conflicting, the question to be resolved is a triable issue of a material fact. (Open. 3rief pp. 38-39). (Clk. Tr. pp. 484, 721).

10. When Montlavo/MDC filed for

bankruptcy on September 27, 1985, and received final discharge on April 2, 1986, and scheduled for discharge the subject note and trust deed, and the subject agreements referred to in paragraph 17 of the first amended complaint, and above, triable issues of material facts existed as to whether the discharge discharged said agreements, note and trust deed, any obligations, if any, Montalvo/MDC had to City and to American Motorists. (Open. Brief pp. 39-40; Clk. Tr. pp. 485, 486, 720).

11. Since American had no obligation to pay the sidewalk bonds to City, the payment was voluntary; and American had no right to recover from the principal or from American Motorists' surety, or from the note and trust deed. The issue of voluntary payment was a triable issue of a material fact.

ARGUMENT

I

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN NOT FOLLOWING THE PRECEDENT LAID DOWN IN (AND DENYING A REHEARING)

Frazier etc. v. Boccardo, etc. (1977)
70 Cal.App.3d 331, 138 Cal.Rptr. 670

Roland v. Christian (1968)
69 Cal.2d 108, 111, 70 Cal.Rptr. 97

Miley v. Harper (1967)
248 Cal.App.2d 463, 56 Cal.Rptr. 536

The Frazier Court held,

"When party moving for summary judgment is the defendant, he must conclusively negate a necessary element of plaintiff's case and demonstrate that under no hypothesis is there a material fact issue which requires the process of a trial."

In the Roland case, the Supreme Court held,

"The summary judgment procedure is drastic and should be used with caution so that it does not become a substitute for an open trial. This court in two recent cases has stated: 'Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor * * * and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion.' (citation omitted). A defendant who moves for a summary judgment must prevail on the basis of his own affidavits and admissions made by the plaintiff, and unless the defendant's showing is sufficient, there is no burden on the plaintiff to file affidavits showing he has a cause of action or to even file counter affidavits at all. A summary judgment for defendant has been held improper

where his affidavits were conclusionary and did not show that he was entitled to judgment and where the plaintiff did not file any counter affidavits."
(citations omitted). (underscoring added).

In Miley v. Harper Justice Kaus' Opinion held
"The best evidence rule applies to affidavits or declarations which are filed in support of motions for summary judgment."

Following the holding of the above cases, which the trial court and the Court of Appeal are bound to follow, the question is whether the declarations of defendant Al Barker and the declaration of Attorney Harris, one of the defendants' attorneys, are sufficient to sustain the summary judgment.

ATTORNEY HARRIS' DECLARATION

IS INSUFFICIENT

(Clk. Tr. p. 360)

Although Attorney Harris declared under penalty of perjury she had "personal first hand knowledge of the following" which consisted of Exhibit 5 (10 pages) which Attorney Harris allegedly obtained allegedly from the City of Banning, and Exhibit 12 which she allegedly obtained, it appears on the face of said documents that under no circumstances did she have "personal knowledge" of the contents of said documents.

Moreover, none of those documents (attached to her declaration) were authenticated or certified to be true copies of the originals. And even if they were, none of those documents could conclusively negate any of the material allegations of Di Martino's first amended and supplemental complaint, herein called

"complaint". And at no time did Attorney Harris point out to the Court which allegations were negated.

Moreover, none of those documents prove that Montlavo/MDC entered into any contract with City to install sidewalks in the subdivision. The sidewalk bonds is not a contract to install sidewalks, but merely a guaranty that Montalvo/MDC will perform their contract with City if, in fact, there was a contract. There was no contract.

AL BARKER'S DECLARATION

IS INSUFFICIENT

(Clk. Tr. p. 373)

All Al Barker can testify to is that he has possession of copies of the alleged note and trust deed; copies of alleged agreements, and documents; he did not state he was the custodian of the records of Al Barker Insurance, or of American Motorists; he assumed or concludes that Montalvo executed the note and trust deed;

he does not state for what purpose the note and trust deed were obtained; he speaks of "various bonds" which were never identified; he states what Montalvo "explained" or "requested" or what Montalvo "expressly understood" when at no time did he ever see or speak or correspond with Montalvo; he assumed Montalvo had a sidewalk contract with City; and it appears without any doubt he had no personal knowledge of any of the alleged facts stated in his declaration.

The foregoing is further confirmed in Al Barker's deposition wherein Al Barker testified under oath that he had no personal knowledge of what he stated in paragraphs 3 through 11 of his declaration. The only fact of any worth he testified to was that had he known Montalvo did not have a written contract with City to install sidewalks, he would never have authorized the issuance of sidewalk bonds.

It had to be very clear to the Court of Appeal that the alleged declarations of Attorney Harris and Al Barker were without any doubt insufficient to sustain the summary judgment; otherwise why would the Court of Appeal go on a fishing expedition to find an incredible basis for waiver?

The deposition testimony of Al Barker is summarized on pages 19-23 of Di Martino's "Appellant's Reply Brief" filed in the Court of Appeal which shows that in all material respects his declaration is untrue, if not falsely made with assistance.

II

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN DETERMINING FOR THE FIRST TIME ON APPEAL WITHOUT PERMITTING ANY BRIEFING BY THE PARTIES, THAT DI MARTINO HAD WAIVED HER OBJECTIONS TO THE COMPETENCY OF THE MOVING PARTIES' DECLARATIONS AND EXHIBITS, AND DENYING A REHEARING.

Although this issue was not addressed by either party in the briefs, the Court holds for the first time in its Opinion that all objections were waived.

Although the Court states that its conclusion "cuts against both parties" (Opinion, p. 7), it is quite clear that the conclusion essentially injures only the plaintiff, because it permits the defendant to base its successful summary judgment on wholly incompetent evidence.

In fact, the law is very clear that while certain objections may indeed be waived by failure to assert them, a summary judgment cannot be based upon incompetent evidence, and hence such objections cannot be waived.

In any event, counsel for plaintiff repeatedly requested rulings by the trial court on the objections, only to receive no response; the law does not require a litigant to do the impossible, i.e., to

force the trial court to make a ruling when the Court refuses to do so after repeated requests.

III

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN CONCLUDING THAT DI MARTINO HAD WAIVED HER OBJECTIONS TO THE INCOMPETENCE OF THE EVIDENCE PRESENTED IN SUPPORT OF THE SUMMARY JUDGMENT MOTION, AND DENYING A REHEARING.

While the summary judgment statute (Code of Civil Procedure, §437c) does require written evidentiary objections to be filed, it has long been held that certain objections cannot be waived even by the failure to assert them in the trial court.

In Zuckerman v. Pacific Savings Bank (1986) 187 Cal.App.3d 1394, 1404, the Court expressly held that

"While appellants waived their right to assert the hearsay objection to their failure to raise below, there can be no waiver of the right to object to matters inadmissible by virtue of incompetency . . . ."

In the instant case, the Court acknowledged plaintiff had filed her evidentiary objections in the trial court. (Opinion p. 5).

In addition, Withcell v. De Korne (1986) 179 Cal.App.3d 965, 974 holds to the same effect stating as follows:

"Where the moving party's declaration or affidavit is insufficient, there is no need to consider the sufficiency of the affidavits of the opposing party. (Kelliher v. Kelliher (1950) 101 Cal.App.2d 226, 231-232, 225 P.2d 554.) This is true even if the other party makes no counter showing at all.

While it is true, as a general rule, that a failure to file an affidavit in opposition to a summary judgment motion would entitle the trial court to accept as true the facts set out in the moving party's affidavit (Cone v. Union Oil Co. (1954) 129 Cal. App.2d 558, 563, 277 P.2d 464), it is also true that there can be no waiver of the right to object to matters inadmissible by virtue of incompetency. (Southern Pacific Co. v. Fish (1958) 166 Cal.App.2d 353, 365, 333 P.2d 133.) ". . . While it is arguable that the 1980 amendment to section 437c, which added a provision for waiver of evidentiary objections not asserted in a timely manner, undercut these earlier decisions, we believe such a conclusion to be inappropriate. That amendment did not in any way ease the burden of a party seeking summary

judgment to make a proper showing.[9] In the same sub-paragraph of section 437c, the Legislature retained the mandatory language regarding the manner in which the motion was to be supported.[10])"

Sesma v. Cueto (1982) 129 Cal.App.3d 108, 113, cited by the Witchell Court where the Court reversed a summary judgment because the moving defendant's declaration was conclusionary even though plaintiff apparently had made no objections thereto.

In Cent. Mut. Ins. v. Del Mar Beach Club Owners (1981) 123 Cal.App.3d 916 (4th District) the Court, with reference to summary judgments, said

"The insureds contend the affidavits supporting some of the motions for summary judgment contain inadmissible matter and the judgment lacks evidentiary support because it violates the best evidence rule (Evid. Code, §1500).[7]

> Even though the issue was not raised below, the insureds contend the court did not have before it the best evidence and judgment must be reversed. "Southern Pacific Co. v. Fish, (1958) 166 Cal.App.2d 353, 365, 333 P.2d 133, states the rule in California that in summary judgment proceedings there can be no waiver of the right to object to matter inadmissible by virtue of its incompetency. Fish is dispositive of this issue (see also Dugar v. Happy Tiger Records, Inc., 41 Cal.App. 3d 811, 817-818, 116 Cal.Rptr. 412). As in Fish and Dugar, the documents in some of the motions were not originals; thus their consideration by the court was a violation of the best evidence rule and this constituted reversible error."

Under this clear case law, the grant of summary judgment cannot be based upon evidence which, on its face, is incompetent to prove

the facts asserted.

The critical items of inadmissible evidence which defendants submitted in support of their motion for summary judgment are the following:

1. The declaration of Jill M. Harris, one of the attorneys for the moving party defendants, and the exhibits which she attached to her declaration. (Clk. Tr. pp. 360, et seq.). Those exhibits were not originals; they were not authenticated and not certified as true copies of the alleged records of the City of Banning of which Attorney Harris could not have had personal knowledge although she had declared under penalty of perjury that she had personal knowledge. Attorney Harris knew that her declaration and said exhibits were insufficient to support the summary judgment. (Rptr. Tr. pp. 18-20 dated 7/10/89).

2. The declaration of Al Barker (Clk. Tr. pp. 373, et seq.) was totally

contradicted by his deposition wherein Al Barker testified that from 1980 to May 24, 1989, he had no dealings and no conversations with Montalvo; he wrote no letters to Montalvo and did not notify Montalvo that American had paid City on the bonds; he had nothing to do with payment of the bonds to City (pp. 16-19); nothing to do with the checks, the dates, the loss date; never saw any of the bonds; he had nothing to do with the sidewalk bonds; he assumed Montalvo had a contract with City; without such a contract, he would not issue any bonds. The deposition of Al Barker was summarized in plaintiff's reply brief at pages 19, et seq. which shows that his declaration was totally conclusionary and insufficient to support the summary judgment.

IV

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED, REGARDLESS OF WHETHER THERE CAN BE A WAIVER OF COMPETENCE OF EVIDENCE SUBMITTED TO SUPPORT SUMMARY JUDGMENT; THERE WAS NO WAIVER HERE, BECAUSE DI MARTINO REPEATEDLY REQUESTED EVIDENTIARY RULINGS FROM THE TRIAL COURT; AND DENYING A REHEARING.

The objection was not waived, because plaintiff repeatedly requested the trial court to rule on the objections:

Plaintiff filed written evidentiary objections, as required by C.C.P., §437c and advocated by Wile & Brown; (Clk. Tr. p. 429).

Plaintiff requested a written order from the trial court explaining its ruling on summary judgment, and presumably stating its overruling of plaintiff's evidentiary objections; (Clk. Tr. p. 705); and

Plaintiff filed a motion for reconsideration and/or for a new trial repeating the evidentiary objections. (Clk. Tr. p. 710).

The law is very clear that where a party has objected to evidence and the objection is overruled, it is unnecessary to repeat the objection when similar evidence is presented later in the trial. (People v. Antic (1975) 15 Cal.3d 79, 95). By the same token, where a party repeatedly requests the trial court for a ruling on objections and the trial court does not provide such a ruling, that party should not be precluded from raising the point on appeal since the party has done everything possible to obtain a ruling from the trial court.

Here, plaintiff's repeated requests for a ruling on the objections should be deemed adequate to preserve the issue for appeal.

V

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN DETERMINING THAT THE ENFORCEMENT OF THE SURETY BONDS DID NOT DEPEND UPON THE EXISTENCE OF ANY UNDERLYING AGREEMENT TO INSTALL SIDEWALKS.

At page 9 of its Opinion, the Court stated, as follows:

> "It is the existence of valid surety bonds which American is obligated to honor (not the existence of an underlying valid obligation between Montalvo and the City) . . . which is determinative of American's right to proceed against Security."

By this statement the Court of Appeal apparently concedes there was no contract for Montalvo/MDC to install sidewalks.

This conclusion of the Court of Appeal is clearly contrary to the law, which provides that the obligation on a surety

bond goes only so far as the obligation on the underlying contract.

For example, in Ragghianti vs. Sherwin (1961) 196 Cal.App.2d 345, 351, the court held that while a surety may pay a claim without being compelled to do so in legal proceedings, the surety must have more than a good faith belief that liability exists. The surety can obtain reimbursement from its principal only if it

> "can be shown that liability was clearly established and that the suit would have been more than a mere formality."

Similarly, in U. S. Leasing Corporation v. DuPont (1968) 69 Cal.2d 275, 290, the California Supreme Court expressly held that

> "since the liability of a surety is commensurate with that of the principal where the principal is not liable on any obligation, neither is the guarantor."

More recently, in Pacific Employers Ins. Co. v. City of Berkeley (1984) 158 Cal.App.3d 145, 150-151, the court expressly stated that

> "The liability of a surety on a contractor's performance bond does not rest solely on the terms of the bond, but grows out of and is dependent upon the terms of the contractor's contract, for the obvious reason that there can be no obligation on the part of the surety unless there has been a default by the contractor on his contract."

This rule only makes common sense. A surety bond guarantees performance of the contract. Where the contract is invalid or for some other reason does not provide for performance there obviously can be no liability on the surety bond.

There exists a long line of cases holding to the same effect. (Open. Brief p. 34).

VI

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN CONCLUDING A CONTROVERSY EXISTED AS TO WHETHER MONTALVO WAS OBLIGATED TO INSTALL SIDEWALKS.

This conclusion is contrary to the undisputed facts and is against law. Without a contract to install sidewalks supported by a valuable consideration, no obligation to install sidewalks exists, and therefore, there is no controversy. In any event this would be a triable issue of a material fact.

The Final Tract Map and the terms and conditions prepared by the City did not provide for sidewalk installation. In fact City specifically deleted sidewalk requirement. (Open. Brief p. 31; Clk. Tr. pp.575-582, 652-653). That was the only contract Montalvo had with City.

On December 5, 1980, City approved and accepted Montalvo's work of improvement and

authorized the release of the four bonds posted by Al Barker (American) in 1979-1980. (Clk. Tr. p. 619).

To secure American's obligation to City on the four surety bonds American obtained from Montalvo in the years 1978-1979, the second alleged trust deed of Montalvo and their "Indemnity" Agreement, and their "Lent Collateral" Agreement and their "Collateral Receipt", none of which were signed by American or by Al Barker. (Open.Brief pp. 5-6; Clk. Tr. pp. 223-224). Those documents including the trust deed were suretyship or guaranty documents guaranteeing American's liability as a surety on the said four performance bonds. (Open.Brief pp. 27-29; Clk. Tr. pp. 502-513; 612-621, 639-640).

Montalvo performed the work of improvement called for by the Final Tract Map and the terms and conditions, and on December 5, 1980, the City approved and accepted the

improvements and authorized the release of American's four surety bonds. American never became obligated to City in any amount on said bonds. (Open. Brief pp. 27-29; Depo. of Al Barker; Clk. Tr. pp. 502-513, 612-621, 639-640).

The Court of Appeal's contention that in 1981 Montalvo and City entered into "another agreement" whereby City agreed to release the four performance bonds in exchange for sidewalk installation bonds has no support in fact or in law, and is a misconstruction of the facts and the law.

If we adhere to plain contract law it becomes crystal clear that even if we erroneously assume that such an agreement was entered into, the agreement was not binding on Montalvo. Under no circumstances is there any evidence in this case to construe that such "another agreement" was made as the Court of Appeal states.

At that time, December 5, 1980, when City

authorized the release of American's four bonds City knew Montalvo was not obligated to install sidewalks; otherwise City would not have authorized the release of the bonds; and City knew that none of the four bonds released guaranteed installation of sidewalks; otherwise City would not have sought sidewalk bonds in 1981.

NO CONSIDERATION - NO CONSENT

NO CONTRACT

The first time City decided it wanted sidewalks installed was on or about June, 1981, after City had approved and accepted Montalvo's improvements and authorized the release of the four bonds. There is no evidence to justify City's delay in releasing the four bonds, except to refuse to release the bonds to satisfy City's consequent demand for sidewalk bonds, that Montalvo do further work which was not required by the Final Tract Map and the terms and conditions.

There are at least two, if not more, well established legal principles that militate against the cnclusions of the Court of Appeal set out on page 3 of its Opinion.

It is well established that Montalvo having fully performed was entitled to the release of the four bonds. Any alleged agreement City obtained from Montalvo to do further and additional work, install sidewalks, not provided for in City's contract with Montalvo (Final Tract Map and conditions) without additional consideration as a condition to release the four bonds, amounts to a breach of City's contract with Montalvo and constitutes an agreement to do that which City is already legally bound to do, and lacks consideration. There is no evidence that City gave any consideration to Montalvo for installation of sidewalks.

Witkin Vol. 1, Contracts, Summary of Calif. Law 9th Ed. - p. 227, §221

citing

Western Lithograph Co. v. Vanomar Producers (1921) 185 Cal.366, 197 P.103

Byson v. City of Los Aneles (1957) 149 Cal.App.2d 469, 308 P.2d 765

Open. Brief of Di Martino, pages 34-37

It is clear that if the prior four bonds had covered sidewalk installation, City would have no reason to release those bonds. City knew it had no prior contract with corporate Montalvo to install sidewalks, and proceeded with economic pressure to hold up release of the prior bonds to obtain new bonds for the sidewalk.

It is clear that any resolution City adopted in March or June 1981, to install sidewalks could not be converted into a contract to bind Montalvo or for that matter American Motorists. It is therefore obvious that American Motorists was never obligated to City on the sidewalk bonds.

A case in point is Byson v. City of Los Angeles (1957) 149 Cal.App.2d 469,

308 P.2d 765 (Clk. Tr. pp. 482-483).

Byson's facts show that Byson, a contractor, sued defendant for damages for breach of a construction contract. Byson was non-suited; but reversed on appeal. It appeared that defendant refused to accept work which Byson had completed on the ground that Byson was requested to do other work which was not required by the agreement. The Court held:

> "When a contractor has fully" (performed), and "notifies the City of the completion of his job, it becomes the duty of the . . . engineer to accept his work, prepare and assessment . . . and file the assessment with the City Clerk for action by the legislative body . . . . If plaintiff had fully performed . . ., defendant's refusal of his work and its consequent demand that he do further work was a breach of its duty under the contract.
>
> "Defendant urges that even if it wrong-

fully refused to accept the work, plaintiff's performance of the additional work under protest was a voluntary act for which he is not entitled to compensation. This argument cannot be sustained.. . . , plaintiff had no choice other than to comply with the city's demand. A contractor must look to the assessment levied against the individual property owners in order to obtain payment for his work. Payment is not forthcoming until the assessment has been prepared and approved by the city council. And the assessment is not prepared until the contractor's work has been finally accepted by the city. Streets and Highways Code, §5360. Thus plaintiff could receive no compensation until he had performed the work demanded which he alleges was not required by the plans and specifications. He acceded

> to the demands under the pressure of economic necessity. Under the facts alleged we have no doubt of the involuntary nature of the work done by plaintiff under protest."

That two years later the City's Council decided to install sidewalks in the subdivision did not give the Council authority to override the Final Tract Map and the engineer's prior determinations. (Clk. Tr. pp. 471-472, 481, par. 38, lines 7-10).

> Great Western S. & L. Assn'n v. City of Los Angeles 91973) 31 Cal.App.3d 403 107 Cal.Rptr. 359

The Great Western case involved a final tract map which is pertinent here since the final tract map in the instant case did not provide for sidewalks. (Clk. Tr. pp. 471-472).

In view of what has been stated, Al Barker and American paid City on the sidewalk bonds at their own risk.

It thus appears without dipsute that the City's alleged agreement to release the four bonds in exchange for sidewalk bonds was an alleged agreement which City was already legally bound to do and lacked consideration.

If such a controversy existed then the Court of Appeal should have remanded the case to the trial court to resolve that issue. The decision on that issue would resolve all other issues, e.g. a decision that Montalvo was not obligated to install sidewalks would sustain a finding and judgment that the note and trust deed are unenforceable.

VII

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN NOT ADDRESSING THE ISSUE THAT CITY'S RELEASE OF THE FOUR BONDS RELEASED THE SECURITY GIVEN FOR SAID BONDS.

This result would normally follow, which would sustain a finding and judgment that the note and trust deed and all agreements entered

into to secure the four bonds were released and discharged of any further obligations.

Case law holds that bonds are effectively released when authorized. Delays in effectuating the release is immaterial. In this case on December 5, 1980, City authorized the four bonds to be released. It is elementary that City's release of the four bonds also in turn released the surety documents American obtained from Montalvo, including the trust deed. (Open. Brief pp. 34-35).

Government Code, §66499.7 subd. (a)

Civil Code, §2839

When property of any kind is mortgaged or pledged by the owner to secure an indemnitee's debt (bond) such property occupies the position of a surety or guarantor, and anything which would discharge a surety or guarantor will discharge the property.

Valentine v. Donohoe, etc. (1911)
133 Cal.91, 65 P.381

Clk. Tr. p. 473

In the instant case it is indisputable that American was discharged of any liability on the four bonds on December 5, 1980, which discharged the property American had obtained from Montalvo as security.

VIII

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN DECIDING WHEN THE STATUTE OF LIMITATIONS COMMENCED TO RUN UPON CONFLICTING EVIDENCE AND UPON INCOMPETENT EVIDENCE, WHICH CAN ONLY BE RESOLVED UPON A TRIAL ON THE MERITS AS A TRIABLE ISSUE OF MATERIAL FACT.

(Clk. Tr. pp. 484, 721)

Based on Di Martino's claim of "no contract", "no consideration","release of surety and surety bonds", "no liability to install sidewalks","no surety liability on sidewalk surety bonds", the issue of statute of limitations would appear to be moot.

The City had no claim to assert.

But since City did assert a claim, plaintiff, on the assumption that City's claim might be valid, pleaded the bar of the statute of limitations. The statutes asserted in bar are C.C.P., §§343, 337, 359.5 (Clk. Tr. pp. 484, 721).

The alleged sidewalk bonds were dated March 12, 1981, and posted with City on May 26, 1981 (Clk. Tr. p. 633), which commenced the guaranty to run.

Montalvo never commenced to install the alleged sidewalks. City did not assert its claim until July, 1986. American paid the claim on August 19, 1986. More than five years had elapsed.

The only action City took was to claim payment of the sidewalk bonds. Al Barker and American made no demands at any time upon Montalvo or corporate Montalvo to install the sidewalks. City made no demands on corporate Montalvo to install the sidewalks.

The statute commenced to run no later than June 1, 1981. (Clk. Tr. p. 633). Al Barker said he expected Montalvo to install the sidewalks in 1981. (Deposition pp. 78-79).

C.C.P., §359.5(a 4 years state) provides (Clk. Tr. p. 484):

> "If the obligations under a surety bond are conditioned upon performance of the principal, the expiration of the statute of limitations with respect to the obligations of the principal, other than the obligations of the principal under the bond, shall also bar an action against the principal or surety under the bond, unless the terms of the bond provide otherwise."

Since City's claim for payment was barred by said statute, Al Barker and American paid the claim at its own risk.

In Mitchell v. Towne (1939) 31 Cal.App.2d

259, 87 P.2d 908, the Court emphasized that when issue is joined on a plea of statute of limitations, as plaintiff raised herein, and the evidence is conflicting, the question is to be resolved as a triable issue of fact. (Clk. Tr. p. 721).

Thus, if City's action or claim against Montalvo or the corporate Montalvo is barred, City's claim against the surety is barred.

The only questionable evidence the Court of Appeal pointed to was to the incompetent evidence American Motorists presented in support of its motion for summary judgment, namely, Exhibit 5 attached to the declaration of Attorney Harris at page 367 of the Clerk's Transcript, which is dated December 8, 1980, and reads,

> " . . . The "Master Plan of Sidewalks" establishes as a goal the construction of sidewalks by April 24, 1983 . . . ."

Regarding the above, the Court of Appeal erroneously concluded

"The evidence produced by defendants showed that MDI had until April 24, 1983, to install the sidewalks . . . "
(Opinion bottom of p. 9)

How the Court of Appeal could accept an incompetent document to arrive at April 24, 1983, as the date when the statute commenced to run is so ridiculous that it deserves no comment, especially in view of the authenticated and certified letters exchanged between Montalvo and City located in the Clerk's transcript at pages 622, 623, 634, 637. In fact, City did not intend to install the sidewalks until after January 2, 1987 (Clk. Tr. p. 639) and City knew it had no sidewalk contract with Montalvo as late as September 11, 1986. (Clk. Tr. p. 641).

IV

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN CONCLUDING THAT EVEN UNDER THE EXISTING FACTS AND CIRCUMSTANCES OF THIS CASE THE SUBJECT DEED OF TRUST WAS NOT DISCHARGED. (Clk. Tr. pp. 485, 486, 720)

On September 27, 1985, Montalvo filed their petition in bankruptcy and received their final discharge on April 2, 1986. (Clk. Tr. pp. 597, 655). Montalvo scheduled the alleged note and deed of trust and the alleged agreements, alleged in paragraph 17 of the first amended complaint, for discharge.

Montalvo's discharge discharged the alleged note and deed of trust and the agreements alleged in paragraph 17 of the first amended complaint, even though those documents were released as surety in 1980. (Clk. Tr. p. 619).

Montalvo's discharge also discharged any obligation, if any existed, owed City regarding

Tract No. 13019.

Al Barker testified he had notice of Montalvo's bankruptcy from the Bankruptcy Court (which would be in 1985). (Deposition p. 80).

American Motorists did not challenge the discharge of the deed of trust; but since no debt was then owed or accrued on the note and deed of trust, a challenge would have no merit. (Clk. Tr. p. 486).

In U. S. Leasing Corp. v. du Pont (1968) (supra) 69 Cal.2d 275, 70 Cal.Rptr. 393 ruled that no liability can be imposed on a guarantor, unless the principal is liable under the lease. When on June 9, 1961, the principal filed its petition in bankruptcy no payment of rent (debt) was yet due; and that even assuming the surety was not exonerated, the surety incurred no liability under the lease because none had then accrued.

It would therefore appear that American Motorists incurred no liability under the

alleged sidewalk bonds because none had then accrued.

X

APPEAL NO. E 007190

RE: ATTORNEY'S FEES

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL ERRED IN HOLDING THAT AMERICAN MOTORISTS (DEFENDANTS) WERE ENTITLED TO RECOVER THEIR ATTORNEY'S FEES. (OPINION PAGE 10)

As previously stated the trial court denied American Motorists' claim for attorney's fees under C.C., §1717 or otherwise, from which American Motorists appealed. The Court of Appeal reversed and held attorney's fees were allowable under §1717.

The Court of Appeal assumes that Di Martino's action was on the contract which provides for recovery of attorney's fees, namely, the Montalvo's note and deed of trust. This was American Motorists' contention (Opinion p. 10) which the Court of Appeal

followed. (Opinion p. 11 at line 20).

The Court of Appeal avoided the obvious, that the note and deed of trust were extinguished on June 19, 1987, which prompted Di Martino to file her first amended and supplemental complaint. At the Trustee's sale American Motorists added all of its attorney's fees and expenses to the amount owed and due on the note and trust deed. This has never been denied or controverted by American Motorists. (Clk. Tr. pp. 750, et sec.; p. 752 at lines 26-28; p. 753 at lines 1-5).

C.C. §1717 states fees and costs are recoverable when "incurred to enforce the provisions of such contract". Since the note and trust deed have been extinguished, there is no contract to be "enforced". (Clk. Tr. p. 758). Di Martino had no contract with American Motorists, and she did not assume the note and trust deed.

Moreover, Di Martino's action to declare

the deed of trust unenforceable is not an action to enforce a contract. She did not assume the note and trust deed.

Stout v. Turney (1978) 22 Cal.3d 718, and Schlocker v. Schlocker (1976) 62 Cal. App.3d 921, ruled that §1717 applies to a case where the defendant was sued on an alleged contractual liability, which is not the case here.

Glynn v. Marquette (1984) 152 Cal.App. 3d 277 was a case where the buyer and seller had a valid contract to buy and sell real property, which provides for recovery of attorney's fees. The seller sold the property to another. The buyer sued both for specific performance. The buyer prevailed, but the trial court denied attorney's fees against the second buyer. On appeal the Court of Appeal denied an award of attorney's fees and ruled:

" . . . a prevailing litigant's attorney's fees are not recoverable

unless a contract between the parties or a statute so provides (citations omitted).

"Respondent (seller's grantee) was not a party to the contract (between the buyer and seller) which contained the attorney's fees clause, nor is there any evidence that respondent expressly assumed the obligations of the contract between (the buyer and seller). There is no basis in the record for finding any agreement by respondent to pay appellant's attorney's fees in the event of litigation."

"The relief provided by the statute does not make respondent a party to the contract within the meaning of Reynolds and Babcock.

" . . . and does not impose Wende's (seller) contractual obligations on respondent."

In point: Witkin 7 Calif. Proced. 3d Edition pages 575-576, §§150,151. Clerk's Transcript, pp. 760, 761

The Supreme Court will note that in this case the Court of Appeal relied on the Reynolds Metal Co. case. (Opinion pp. 10 and 11).

In Cornelison v. Kornbluth (1975) 15 Cal.3d 590, the Supreme Court held that the "non-assuming" grantee of real property is not personally liable for the trust deed indebtedness or to perform any of the obligations of the trust deed.

The Cornelison Court further held that since the trust deed lien has been extinguished, defendants may not thereafter recover any fees or damages under said trust deed. (Clk. Tr. pp. 761-762).

The Santa Clara S & L case cited by the Court of Appeal (Opinion pp. 11-12) is clearly not in point here. That case does not hold that the attorney's fees were awarded against

the non-assuming grantee personally. The action was against both the Trustor and the Trustor's buyer who did not assume the trust deed. The decision is not clear whom the attorney's fees were awarded; under the cases relied on by Di Martino we can safely assume that the award was against the Trustor or added to the trust deed debt.

Leach v. Home Savings S & L (1986) 185 Cal.App.3d 1295, supports Di Martino. The Leach Court and the Court of Appeal refused attorney's fees to a signatory defendant who had prevailed against a nonsignatory plaintiff, because the Court found that the plaintiff would not have had a contractual or statutory right to receive fees if she had prevailed. (Clk. Tr. pp. 779-780).

CONCLUSION

The entire Opinion of the Court of Appeal is a challenge to Murphy's Law - once said Court goes in the wrong direction as it did here it has to continue in that direction to justify the wrongs committed beforehand. The Opinion of the Court of Appeal represents a travesty of justice only the Supreme Court can stop and correct.

The petition for review should be granted.

Respectfully submitted,

/s/ NICOLAS FERRARA, ESQ.
Attorney for Plaintiff,
Petitioner, Appellant,
Respondent Ida G. Di Martino

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

IDA G. DI MARTINO, (Filed March 20, 1991)	
Plaintiff and Appellant,	E006384, E007076, E007190
v.	
AMERICAN MOTORISTS INSURANCE CO., et al.,	(Super.Ct. No. 183971)
Defendant and Respondent.	OPINION

APPEAL from a judgment of the Superior Court of Riverside County. Gordon R. Burkhart and Ronald T. Deissler, Judges. Affirmed; affirmed and reversed.

Nicolas Ferrara for Plaintiff and Appellant.

Lipow & Harris, Jeffrey A. Lipow, and Jill M. Harris for Defendant and Respondent American Motorists Insurance Company.

Daryl D. Hansen for Defendant and Respondent Dorman Real Estate Investment Co., Inc.

Kazemzadeh & Jacobs and Farhad Kazemzadeh for Defendant and Respondent Ticor Title Insurance Company of California.

INTRODUCTION

In these consolidated appeals, Ida G. Di Martino (plaintiff) has appealed from a summary judgment entered in favor of Ticor Title Insurance Company of California (Ticor) (Appeal No. E006384) and from a summary judgment entered in favor of American Motorists Insurance Co. (American), Al Barker (Al Barker), individually and doing business as Al Barker Insurance, Al Barker Insurance as agent for American, Al Barker Insurance, a California corporation, Al Barker Insurance, a California Corporation, as agent for American, and Dorman Real Estate Investment Co. (Dorman) collectively, defendants) (Appeal No. E007076).

American and Al Barker, individually and doing business as Al Barker Insurance, have

also appealed from an order granting plaintiff's motion to tax costs, which resulted in them being denied attorney's fees for defending the action in Appeal No. E007076 (Appeal No. E007190).

FACTS

Pete and Lupe Montalvo (the Montalvos), plaintiff's predecessors-in-interest, owned the real property at issue here, which is located on Victoria Avenue in Riverside.

The Montalvos owned Montalvo Development, Inc. (MDI). MDI had undertaken a construction project pursuant to an agreement with the City of Banning (City). In order to obtain surety bonds on the project, in 1978 the Montalvos contacted American and Al Barker, and agreed to secure the issuance of four performance bonds with a note and deed of trust on the Victoria Avenue property. The City of Banning was named as obligee on the bonds. The agreements related to this transaction are set out in the Agreement for Lent Collateral, the Collateral Receipt Agreement, the

General Agreement of Indemnity and the surety bonds. Ticor was named as the trustee on the second deed of trust.

MDI and City had a disagreement over MDI's responsibility to install sidewalks, and, in fact, MDI sought a writ of mandate to compel City to release the existing surety bonds. Apparently there was no final judicial determination in that action of the parties' responsibility in this regard, for in 1981 MDI entered into another agreement with the City whereby City agreed to release the four performance bonds in exchange for the issuance of surety bonds for sidewalk installation, with the understanding that MDI might still seek a judicial determination that it was not legally obliged to install sidewalks. MDI had until April 1983 to install the sidewalks. American issued the sidewalk surety bonds in exchange for a premium payment and the release of the four performance bonds. Pursuant to the terms of the Collateral Receipt Agreement, the security already given to American by the Montalvos,

i.e., the note and second deed of trust on the Victoria Avenue property, was retained by American as security for the sidewalk surety bonds.

In 1984, the Montalvos executed a note and third deed of trust on the Victoria Avenue property in favor of plaintiff. Plaintiff forelcosed on the property the following year, and purchased it with a credit bid at the sale, thus obtaining title to it, which title was subject to the second deed of trust in favor of American.

In 1986, City notified American that MDI had defaulted on its obligation to install sidewalks, and demanded that American make good on the sidewalk surety bonds. American therefore paid approximately $32,000 to City under the terms of the bonds.

American then made demand on plaintiff to repay it the sums paid to City. Plaintiff contended that the note and deed

of trust were no longer valid, and did not make the requested repayment. American therefore began foreclosure proceedings against the Victoria Avenue property, pursuant to the terms of the Collateral Receipt Agreement and the note and deed of trust.

Plaintiff then filed this action in which she sought, among other things, declaratory relief that the note and second deed of trust were null and void, cancellation of the note and deed of trust, and injunctive relief to enjoin the sale. Unable to obtain injunctive relief, plaintiff filed for bankruptcy, but the foreclosure sale was held in 1987 and the property was sold to Dorman Real Estate Investment Company.

Plaintiff thereafter amended her complaint to add Dorman as a defendant and to seek damages for the foreclosure sale. She also named as defendants MDI, the Montalvos, and Ticor Title Insurance, the trustee on American's second deed of trust.

Ticor made a motion for summary judgment, contending that, as trustee under a deed of trust, it had no duties to plaintiff other than those prescribed by Civil Code section 2924 et seq., and that specifically it had no duty to determine the validity and amount of the underlying debt before proceeding with a foreclosure sale. Plaintiff opposed the motion, but the trial court granted it and entered summary judgment in favor of Ticor, from which plaintiff then timely appealed, contending that (1) Ticor was her agent and owed her a fiduciary duty; (2) Ticor had a duty to investigate whether or not the second deed of trust was enforceable; and (3) Ticor is liable for making an illegal, fraudulent or willfully oppressive sale of plaintiff's property.

In 1989, defendants also moved for summary judgment, which plaintiff opposed. Defendants' motion was granted, and plaintiff appealed. She contends that (1) there was no sufficient evidence to sustain the summary judgment; (2) the trial court relied on

inadmissible evidence; and (3) the trial court erred by not reconsidering the motion for summary judgment or granting plaintiff's motion for a new trial.

DISCUSSION

APPEAL NO. E006384

Because, As Discussed Below, Defendants Have Established That They Had A Valid Note And Deed Of Trust, And That The Foreclosure And Subsequent Sale Was Therefore Valid, Ticor Cannot Be Liable To Plaintiff.

As Ticor points out, plaintiff's causes of action against Ticor are premised on her contention that the foreclosure sale was improper, there being no valid underlying obligation. Because, as discussed below, we have determined that the summary judgment in favor of defendants was proper, i.e., that the foreclosure sale was valid having been based on a valid underlying obligation, Ticor cannot be liable to plaintiff, and the judgment

in its favor should be affirmed. 1/

APPEAL NO. E007076

Because Plaintiff Failed To Obtain A Ruling On Her Evidentiary Objections, She Waived Such Objections.

Plaintiff objected in writing to evidence filed by defendants in support of their motion for summary judgment. However, the trial court never ruled on plaintiff's objections.

"If a court fails to rule on an evidentiary objection, the party who objected must make some effort to have the court actually rule. If the point is not pressed and is forgotten, he [or she] may be deemed to have waived or abandoned it, just as if he [or she] had failed to make the objection in the first place. [Citations.]'"

1/ Even if such were not the case, our review of the record indicates that the summary judgment in favor of Ticor should be affirmed. Plaintiff failed to raise any triable issues of material fact in response to Ticor's motion and based on the uncontroverted facts established by defendants, they were entitled to judgment as a matter of law.

(3 Witkin, Cal. Evidence (3d ed. 1986) §2030, emphasis in original.)

As noted above, the rationale behind this principle is that the objecting party has waived the objection by failing to obtain a ruling. This rationale applies regardless of whether the objection arises in the course of a jury trial or at a law and motion hearing. In fact, an attorney appearing at a law and motion calendar should be even more concerned with pressing an evidentiary objection because the law and motion judge is responsible for handling many different cases in a short amount of time, and may have forgotten the written objection, or failed to note it when, as here, the objection was made in the context of a broader legal argument and was not flagged or highlighted by being raised as a separate point in the pleading's table of contents or by being placed under a separate heading in the pleading's body. (See, e.g., Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 1988) § 9:98.1: "File your

[evidentiary] objections in a separate document rather than as part of your opposition points and authorities. This should prevent their being overlooked by a busy law and motion judge." See also Id., § 9:98: "Any [evidentiary] objection should be in writing, particularly in courts where no court reporter is ordinarily present in law and motion proceedings. . . . [¶] The judge should be requested to rule on the written objection, and the court clerk should be requested to make sure that the judge's ruling on the objection appears in the minutes.") As the court in Sommer v. Martin (1921) 55 Cal. App.603, stated "[m] any things may be, and are, overlooked which would readily have been rectified had attention been called to them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (Id. at p. 610.)

Our conclusion in this regard cuts against both parties, however, because defendants made written objections to evidence offered by plaintiff, i.e., the declaration of her attorney, Nicolas Ferrara, but also failed to obtain a ruling on their objections.

Defendants Produced Substantial Evidence That The Note And Second Deed Of Trust Were Valid And Enforceable Against Plaintiff As The Montalvos' Successor-In-Interest, And Plaintiff Failed To Raise Any Triable Issues Of Fact As To Any Material Issues.

Plaintiff's argument seems to be that there was no evidence that MDI was required to install sidewalks, that there was no evidence that there was any consideration given for the issuance of the sidewalk surety bonds, and, even if there was, that American was under no obligation to pay City when MDI defaulted on its obligation to install sidewalks because the statute of

limitations had run on any action by City to enforce the surety bonds. Therefore, plaintiff argues, any payment to City by American was simply a voluntary contribution.

In support of the motion for summary judgment, defendants produced correspondence between MDI and City which indicated that although a controversy still existed as to the right of City to require MDI to install sidewalks, MDI resubmitted Surety Bond Nos. ISM 559409, $32,162.34; ISM 559409, $16,081.17; and ISM 559410, $584.73 as a guarantee of performance in the event that a court should later determine that the installation of sidewalks was a valid requirement, and that City then passed a resolution that, MDI having completed installation of most of the public improvements, and having posted additional bonds to guarantee installation of the sidewalks, the faithful performance, labor, material and monument bonds could be released. Defendants also produced evidence, via the

declaration of Al Barker[2/] and the Collateral Receipt executed by the Montalvos, that the Victoria Avenue property was to be retained by American as security as to any bond issued on behalf of MDI.

As to the asserted lack of payment of consideration by MDI to defendants for the surety bonds, the defendants' issuance of such bonds, in a written form, is presumptive evidence of such consideration. (Civ. Code, § 1614.) Plaintiff had the burden of producing some evidence tending to rebut such presumption, so as to raise a triable issue of fact, and did not do so. (Civ. Code, § 1615.)

Defendants also produced evidence, via the declaration of Al Barker and a letter from City, Exhibit 6 to Barker's declaration, that in 1986 he was contacted by City with a demand that

2/ Plaintiff also contended in connection with her opposition below, and on appeal, that Mr. Barker's deposition testimony showed that his declaration was "entirely false." Plaintiff lodged a copy of Barker's deposition transcript with this court. We have reviewed it and conclude that it does not demonstrate that his declaration was false.

payment under the bonds guaranteeing installation of the sidewalks be made, MDI having failed to install the sidewalks, and that American in fact paid City with two checks for $32,162.34 and $584.73, respectively.

This evidence was sufficient to establish defendants' right to foreclose on the second deed of trust. The "evidence" produced by plaintiff in opposition to this showing, which consisted in large part of the argument of Mr. Ferrara, couched in the form of a declaration, failed to raise any triable issue of fact on any material issue. Although plaintiff contended that there was no contract between City and MDI for the installation of sidewalks, she produced no evidence to counter the evidence produced by defendants that MDI had agreed, albeit unwillingly, to obtain surety bonds to guarantee the installation of sidewalks pending further action on its part to obtain a determination that it was under no legal obligation to install the sidewalks. It is the existence of valid surety bonds which American was obligated to honor (not

the existence of an underlying valid obligation between Montalvo and City) and which is determinative of American's right to proceed against its security.

Plaintiff also contended that the statute of limitations had run on American's duty to make good on the bonds. However, as defendants point out, the statute of limitations begins to run not at the time an agreement is made, but when it is breached, or, more specifically in the case of a surety bond, when the principal fails to perform its obligations within the time required for performance. (Los Angeles County v. Security Ins. Co. of Hartford (1975) 52 Cal.App.3d 808, 817.) The evidence produced by defendants showed that MDI had until April 24, 1983 to install the sidewalks, and that City made its demand for performance on the surety bonds in July 1986, which was within the four-year statute of limitations for an action upon "any contract, obligation or liability founded upon an instrument in writing." (Code Civ. Proc., § 337, subd.(1);

Los Angeles County v. Security Ins. Co. of Hartford, supra, 52 Cal.App.3d 808,816.)

Plaintiff also contended that Montalvo's obligation to American was discharged by his personal bankruptcy, but this contention was entirely without merit, because prepetition liens and deeds of trust are not discharged by bankruptcy. (11 U.S.C. § 552, subd. (b).)

APPEAL NO. E007190

Defendants Were Entitled To Recover Their Attorney's Fees.

As noted above, defendants have appealed from the order striking their claimed attorneys' fees as an item of costs. They contend that even though plaintiff was not a signatory to the note and second deed of trust which contained an attorneys' fees provision, they should be able to recover such fees from her pursuant to Civil Code section 1717.

Civil Code section 1717 provides in relevant part:

"In any action on a contract, where such contract specifically provides that attorney's

fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements."

In Reynolds Metals Co. v. Alperson (1979) 25 Cal.3d 124, the California Supreme Court was faced with the question of whether or not the terms "parties" and "party", as used in section 1717, referred to signatories or litigants. It concluded that because the section was enacted to establish mutuality of remedy where a contractual provision made attorney's fees available for only one party to the contract, and because it was also enacted to prevent the oppressive use of one-sided attorney's fees provisions, those terms should be interpreted to mean litigants, so that if, for example, a nonsignatory defendant was sued on the contract as though he was a party to it, and the plaintiff would be entitled to attorney's fees if the

plaintiff prevailed, the defendant, though not a signatory, would be entitled to a reciprocal remedy if he prevailed.

Under the analysis of Reynolds Metals Co., defendants here are clearly entitled to recover their reasonable attorneys' fees, assuming that they are determined to be the prevailing party on the contract. The fact that plaintiff was not a signatory to the contract does not prevent an award of attorneys' fees from being made against her so long as her action was one upon a contract with an attorneys' fees provision and, if she had been successful, she would have been entitled to an award of such fees against defendants. Here, her declaratory relief action was clearly one "on a contract," i.e., the promissory note and second deed of trust (see, e.g., Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal.App.3d 447, 460), and, if she had been successful in her attempt to have those instruments declared null, void and unenforceable, she would have been entitled to an award of

attorneys' fees against defendants. (Id.) We note that although the parties apparently believe this to be an issue of first impression, in Santa Clara Savings & Loan Assn. v. Pereira (1985) 164 Cal.App.3d 1089, 1097-1098, attorneys' fees were awarded to a lender, as beneficiary under a trust deed, against nonassuming grantees after it was forced to bring an action for declaratory relief against them for a determination that it had a right to accelerate its due-on-sale clause when they refused to provide it with adequate evidence of creditworthiness.

DISPOSITION

The summary judgment in favor of Ticor in appeal No. E006384 is affirmed.

The summary judgment in favor of defendants in appeal No. E007076 is affirmed.

The order granting plaintiff's motion to tax costs in appeal No. E007190 is reversed, and the trial court is directed to make a determination as to whether or not defendants were the prevailing parties on plaintiff's

declaratory relief action on the contract, and, if so, to determine a reasonable amount of attorneys' fees to which they are entitled on the contract cause of action, both for work done at the trial level and on appeal.

Plaintiff's motion for monetary sanctions in appeal No. E007190 on the asserted basis that defendants' appeal is frivolous is denied.

NOT FOR PUBLICATION.

TIMLIN
J.

We concur:

DABNEY
Acting P.J.

HOLLENHORST
J.

COURT OF APPEAL

STATE OF CALIFORNIA

Division Two

FILED
APR 16 1991
COURT OF APPEAL
FOURTH DISTRICT

ORDER

MARTINO, IDA G.
PLAINTIFF-APPELLANT

v.

AMERICAN MOTORISTS INSURANCE CO.,
ET AL,
DEFENDANT-RESPONDENT

E006384/E007076/E007190

Riverside County No. 183971

THE COURT:

The petition for rehearing is DENIED.

TIMLIN
Acting Presiding Justice

cc: Riverside County Superior
Court Clerk
All Counsel

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles,State of California. I am over the age of 18 and not a party to the within action; my business address is 8484 Wilshire Boulevard, Suite 200, Beverly Hills, CA 90211.

On April 26, 1991, I served the foregoing document described as PETITION FOR REVIEW on the following parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED MAILING LIST.

(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Beverly Hills, California.

Executed on April 26, 1991, at Beverly Hills, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I declare that I am employed

in the office of a member of the bar of this court at whose direction the service was made.

/s/ Angela Loffarelli

MAILING LIST

Hon. Ronald T. Deissler, Judge
Hon. Gordon R. Burkhart, Judge
Superior Court of California
County of Riverside
4050 Main Street
Riverside, CA 92501

Jill M. Harris, Esq.
Lipow & Harris
2049 Century Park East
Suite 1800
Los Angeles, CA 90067

Daryl Hansen, Esq.
738 EAst Chapman Avenue
Orange, CA 92666

Farhad Kazemzadeh, Esq.
Kazemzadeh & Jacobs
1717 Walnut Grove Avenue
Rosemead, CA 91770

Court of Appeal
303 West Fifth Street
San Bernardino, CA 92401

Fourth Appellate District, Division Two

No. E 006384

S020792

SUPREME COURT
FILED
JUN 19 1991

ROBERT WANDRUFF CLERK
DEPUTY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IDA G. DI MARTINO, Appellant

v.

AMERICAN MOTORISTS INSURANCE CO.,
et al, Respondents

Appellant's petition for review DENIED.

ARABIAN
Acting Chief Justice

CHAPTER 540

An act to amend Sections 409, 431.10, 437c, 470, 471, 572, 585, 597, 630,631.8 and 998 of, to add Section 587.5 to,and to repeal and add Section 581 of, the Code of Civil Procedure, relating to civil procedure.

[Approved by Governor August 21, 1986. Filed with Secretary of State August 21, 1987.]

The people of the State of California do enact as follows:

SEC.3. Section 437c of the Code of Civil Procedure is amended to read:

437c. (a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days have elapsed since the general appearance in the

action or proceeding of each party against whom the motion is directed or at such earlier time after the general appearance as the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be

taken. The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made either in writing or orally at the hearing shall

be deemed waived.

The provisions of Section 1005 and the provisions of subdivision (a) of Section 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably

deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(e) If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an

individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f) A party may move for summary adjudication of issues, either by itself or as an alternative to summary judgment. If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that those issues are without substantial controversy. Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists a material, triable controversy, and shall specifically refer to the

evidence which establishes a triable issue of fact regarding each of those issues. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for

summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

(i) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur.

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the

summary proceeding herein provided for.

(k) In actions which arise out of an injury to the person or to property when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(l) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within 10 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding 20 days as the trial court may for good cause allow, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the period within which

to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of Calfornia but within the United States, and 20 days if the place of address is outside the United States.

(m) Nothing in this section shall be construed to extend the period for trial provided by Section 1170.5.

(n) The provisions of subdivisions (a) and (b) shall not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

CIVIL PROCEDURE - SUMMARY ADJUDICATIONS

CHAPTER 1561

S.B. No. 2594

AN ACT to amend Section 437c of the Code of Civil Procedure, relating to civil procedure.

[Approved by Governor
September 29, 1990]

[Filed with Secretary of State
September 30, 1990]

LEGISLATIVE COUNSEL'S DIGEST

SB 2594, Robbins. Civil procedure: summary judgment and summary adjudication.

Existing law sets forth the grounds for and effects of summary judgment and summary adjudication. Existing law, among other things, provides evidentiary objections not made either in writing or orally at the hearing shall be deemed waived.

This bill would revise existing law and provide all of the following: (1) evidentiary objections to a motion for

summary judgment not made at the hearing shall be deemed waived; (2) any incorporation by reference of matter in the court's file shall set forth with the entire file; (3) any objections based on the failure to comply with provisions governing supporting and opposing affidavits or declarations shall be made at the hearing or shall be deemed waived; (4) if it is contended that one or more causes of action within an action has no merit, as specified, or that there is no defense thereto, as specified, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs, any party may move for a summary adjudication as to that cause of action, causes of action, claim for damages, affirmative defense, or issue of duty; and (5) that upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall make an oral or written order, as specified.

This bill would also delete specified provisions allowing a party to move for summary adjudication of issues, as specified.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of this legislation to provide that all objections to the form and substance of the moving and opposing papers shall be first made in the trial court and not on appeal by the parties or by the appellate court and to expressly overrule the rules stated in Witchell v. De Korne, 179 Cal.App.3d 965 and Zuckerman v. Pacific Savings Bank, 187 Cal. App.3d 1394.

It is also the intent of this legislation to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense.

Evidentiary objections not made * * * at the hearing shall be deemed waived.

* * * Section 1005 and * * * subdivison (a) of Section 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

Any incorporation by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted

by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived.

(e) If a party is otherwise entitled to a summary judgment pursuant to this * * * section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only

proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to (this ends the relevant portion of this Statute).

6236 Additions or changes indicated by underline; deletions by asterisks * * *